IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-1236 and 77-1269

GENERAL ATOMIC COMPANY,
Petitioner,

v.

EDWIN L. FELTER, ETC., ET AL.,
Respondents.

On Petitions for Writs of Certiorari to the Supreme Court of New Mexico

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SUPPLEMENTAL BRIEF FOR RESPONDENT UNITED NUCLEAR CORPORATION IN OPPOSITION

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Pursuant to Supreme Court Rule 24(5), respondent United Nuclear Corporation ("UNC") files this supplemental brief in response to the brief of the Government of Canada as *amicus curiae* in support of petitioner, which was filed in this Court at the same time as the respondents' briefs in opposition. With all due respect to the Government of Canada, its brief does not provide any basis for this Court to grant the petitions for writs of certiorari.

1. Nothing in the *amicus* brief detracts from or affects the demonstration on pages 18-21 of the our brief in opposition that the decisions of the New Mexico Supreme Court denying petitions for extraordinary writs rest on independent and adequate state grounds.

2. The *amicus* brief does not support the constitutional, act of state, or foreign relations arguments made by GAC. Indeed, the brief states (p. 2, n.1) that the "Government of Canada takes no position on the merits of the case."

3. The *amicus* arguments are based upon the contention (p. 6) that "the New Mexico courts have violated well-established principles of international comity, which are recognized by United States law." That argument was not presented in those terms to the New Mexico Supreme Court and thus is not properly before this Court. Supreme Court Rule 23(1)(f). In any event, this Court pointed out in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 423 (1964), that while "United States courts apply international law as a part of our own in appropriate circumstances * * *, the public law of nations can hardly dictate to a country which is in theory wronged how to treat that wrong within its domestic borders."

4. The authorities from the Second Circuit relied upon by *amicus* (p. 7) do not show that the District Court in this case violated any principle of international comity or constitutional law in issuing the November 18 order that was the subject of GAC's attempts to persuade the New Mexico Supreme Court to issue an extraordinary writ.

In *Application of Chase Manhattan Bank*, 297 F.2d 611 (2d Cir. 1962), the most recent of those authorities, the Court of Appeals affirmed a district court ruling that Chase had sufficiently shown that production of the rec-

ords requested by a grand jury subpoena *duces tecum* would violate Panamanian law. It is significant to note, however, that the district court left the subpoena outstanding "to insure that Chase complied with its 'duty of actively cooperating with the Government'" in persuading the Panamanian authorities to authorize production, and the Court of Appeals noted that Chase "will still be required to demonstrate its good faith, since the [trial] court left the subpoena outstanding." 297 F.2d at 613.

Hence that case supports the entry of the November 18, 1977 discovery order and the necessity of a good faith effort to comply, and the finding below that GAC did not make a good faith effort to comply with its discovery obligations is not attacked here. Neither the *Chase Manhattan* case nor any of the others cited by *amicus* [1] holds that a state court is constitutionally prohibited from following the procedure set forth in *Societe Internationale* v. *Rogers*, 357 U.S. 197 (1958), and entering a discovery order as a predicate for whatever sanctions may be

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[1] In *Federal Maritime Commission* v. *De Smedt*, 268 F. Supp. 972 (S.D.N.Y. 1967), the case was before the district court on a motion by the FMC for an order adjudging respondents in contempt for failure to produce documents in violation of foreign law. It thus concerned a sanctions order, not simply a discovery order.

In *First National City Bank of New York* v. *Internal Revenue Service*, 271 F.2d 616 (2d Cir. 1959), *cert. denied*, 361 U.S. 948 (1960), the Court of Appeals reversed a district court order relieving a party from the obligation to comply with a subpoena *duces tecum* that required the production of foreign documents. It directed the district court "to explore in contempt proceedings * * * the ability of the Bank to comply without subjecting its personnel to criminal sanctions under Panamanian law." 271 F.2d at 620.

Although *Ings* v. *Ferguson*, 282 F.2d 149 (2d Cir. 1960), speaks of international comity in the passage quoted (Canada Br. at 7), the case concerned a subpoena *duces tecum* directed to a nonparty, and the court was principally concerned that other available means to secure the documents without the issuance of a subpoena (*i.e.*, letters rogatory) first be exhausted.

appropriate.[2] A court may elect to quash a production order because of the demonstrated impossibility of complying with the order without violation of foreign law, but such election is not constitutionally compelled.

5. The Canadian Information Security Regulations forbid any "person who has in his possession or under his control" certain "written or printed material" to "release any such note, document or material, or disclose or communicate the contents thereof * * *." (Pet. No. 77-1269 App. 86a.) Those regulations do not in terms prohibit the identification of such material. The *amicus* brief admits that a discovery order—as opposed to a sanctions order—is appropriate "in order to facilitate a clarification of foreign law" (Br. 7, n.12), but states that the letter from the Canadian Minister dated October 19, 1977 (Pet. No. 77-1236 App. 37a) made clear that Canadian law prohibited production or identification of documents housed in Canada (Br. 7, n.12). In fact, the October 19 letter did far less. It responded to a letter from counsel for GAC that stated that the required identification would include a "[s]ummary of contents" (Pet. No. 77-1236 App. 34a, 36a). The Canadian Minister said only that compliance with the District Court's orders, "*in the manner described in your letter*, would be a violation of the Regulations." *Id.* App. 38a (emphasis added).

In its November 18 order, the District Court observed that its prior order requiring identification of documents had *not* specified a "summary of contents." See *id.* App. 3a. For this reason, the court found that, when GAC advised the Canadian Minister that a summary of contents would be required, the provisions of its prior order "were not performed or complied with but rather

[2] The discovery orders at issue in the instant case are much more limited than those in any case cited by *amicus*. The District Court required *production* of documents housed in Canada only "[i]nsofar as it is lawful to do so." See UNC Br. Opp. 7-9.

they were sought to be avoided." *Id.* Accordingly, as of November 18, the District Court had good reason to doubt GAC's assurances that mere identification of the documents in question would violate Canadian law, and the order was appropriate for the very reasons, among others, that the *amicus* brief acknowledges as valid—to insure that good faith efforts were made to negotiate the identification of the documents or to obtain a clarification of foreign law.

In fact, the diplomatic note transmitted to this Court by the Solicitor General on March 16, 1978, indicates that identification of the documents is not flatly prohibited under the Canadian Regulations. The note states on page 3 that:

> "The interpretation of the Regulations, including a determination of their scope, is a matter for Canadian courts. However, in the application of these Regulations, the Government of Canada has proceeded on the understanding that any *identification* of documents covered by the Regulations *which involved drawing upon the information in the documents is prohibited by the Regulations.*" (Emphasis added.)

GAC neither identified any of the documents located in Canada without "drawing upon the information in the documents" nor sought a determination by the Canadian courts concerning the extent to which it might produce or identify the documents so as to comply as fully as possible with the orders of the New Mexico District Court. See p. 4, n.4, of the *amicus* brief, and Recitals 31-35, UNC Br. Opp. App. 13a-14a.

6. On page 10, the *amicus* brief makes the remarkable assertion that "[a] private party's effort to obtain discovery in a case involving New Mexico law does not involve vital national interests of the United States," citing *In re Westinghouse Electric Corp. Uranium Contracts Litigation*, 563 F.2d 992, 999 (10th Cir. 1977). But the dis-

cussion at the cited page supports the contrary proposition. After acknowledging the legitimate national interest of the Government of Canada in the Canadian laws there at issue (563 F.2d at 998), the court said:

> "The United States admittedly has a 'national interest' of its own. In the instant case the United States has an interest in making certain that any litigant in its courts is afforded adequate discovery to the end that he may fully present his claim, or defense, as the case may be." 563 F.2d at 999.

While that case arose in the federal courts, there can be no doubt that the quotation is fully applicable to state courts as well. The great bulk of litigation in the United States occurs in state courts, and the United States manifestly has a strong interest in fair trials in those courts. The District Court in this case, attempting to ensure a fair trial of the issues before it, showed no disrespect for the Government of Canada by entering the order of November 18, 1977. See UNC Br. Opp. 5-9.

7. The remainder of the concerns in the *amicus* brief appear to relate to the Sanctions Order and Default Judgment, entered on March 2 and amended on March 27, 1978 (UNC Br. Opp. App. 1a).[3] That order, as we have

[3] The District Court did not "disput[e] the Canadian Government's interpretation of its own Regulations" or question "the authority of the Minister of Energy, Mines and Resources to address issues regarding the Regulations * * *." (Br. 11.) In the Recital that is cited (Pet. No. 77-1269 App. 14a; UNC Br. Opp. App. 14a), the District Court merely held that "GAC's writing a simple letter to a Canadian Minister who had been declared by law to have no authority to interpret Canadian Security Regulations or to grant a dispensation therefrom does not constitute a 'good faith' effort to secure the release of documents in Canada or the information contained in them." The *amicus* brief admits that the Minister in question, because of an intervening court decision, "no longer possessed the authority to grant a waiver of the Regulations" (Br. 5), and the Minister himself had written GAC that as a result of that decision, he was "not able to consider your request." Pet. No. 77-1236 App. 41a. The *amicus* brief does not attempt to show that the recital was unjustified in any way.

explained in detail in our brief in opposition, rested in substantial part on many discovery failures that have nothing to do with Canadian law—including failing to produce documents housed in Canada that GAC was ordered to produce long prior to adoption of the Canadian Regulations, deliberately storing documents in Canada to avoid discovery, and failing to make timely disclosure of cartel documents located in this country. UNC Br. Opp. 14-15. Furthermore, the order has not yet been reviewed by the New Mexico appellate courts. The *amicus* brief does not indicate how a default judgment that will soon be appealed and that is based on extensive findings of "utmost bad faith" in discovery "poses a continuing problem to international relations" (Br. 12). Nor does it explain why this Court should provide immediate appellate review of state trial court orders like those at issue here. The concerns of the *amicus*, at this stage of the proceedings, are appropriately addressed to the New Mexico appellate courts.

For the foregoing reasons, and for the reasons stated in our brief in opposition, the petitions for writ of certiorari should be denied.

Respectfully submitted,

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